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IN THE

Supreme Court of the United States

October Term, 1945

No. 748

UNITED STATES, *Petitioner,*

v.

B-W CONSTRUCTION COMPANY, *Respondent.*

BRIEF IN OPPOSITION TO PETITION FOR WRIT
OF CERTIORARI.

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OPINION BELOW.

The opinion of the Court of Claims has not yet been officially reported, but will be found at pages 41 to 48 of the record.

JURISDICTION.

The judgment of the Court of Claims was entered on November 5, 1945 (R. 48-49). The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended.

QUESTIONS PRESENTED.

1. Whether under the standard form of Government construction contract the Government is liable to the building contractor for damages caused by delays produced by its errors and long delays in correcting them and by its other delays not the result of the exercise by it of any right conferred by the contract, when the contractor completes performance within the contract time

as extended but later than he otherwise would have completed performance had there been no such delays.

2. Whether, if the Government is so liable, the court below was correct in including in the damages assessed (a) a proportionate part of the contractor's home office overhead, and (b) the rental value of certain equipment, both of which the court found to be losses incurred by plaintiff because of the delays caused by petitioner.

STATEMENT.

On April 23, 1932, respondent, an Illinois corporation, entered into a contract with the United States to remodel the Post Office building at Washington, D. C., and construct an addition thereto. For this the respondent was to receive from the United States \$2,999,000 (Fdg. 1; R. 18). The contract required the work to be completed within 720 days from receipt by the respondent of notice to proceed (Fdg. 1; R. 18). Respondent received notice to proceed on June 22, 1932, and the contract completion date was therefore June 12, 1934 (Fdg. 1; R. 18).

During the progress of the work, respondent was granted extensions of time totalling 362 days of which 267 days were because of change orders, and 95 days because of strikes, bad weather and defaulting subcontractors (Fdg. 1; R. 18). The performance of the change orders did not actually delay final completion as much as 267 days (Fdg. 1; R. 18). In fact, it did not delay the final completion date more than 50 days (Fdg. 1; R. 18).

The extensions of 267 days because of change orders were nearly always granted before the work was done and were based almost entirely on mere estimates, and the work involved in the change orders amounted to less than \$90,000 (Fdg. 1; R. 18). It will thus be observed that the contract time was extended by a period equal to 37% of the original contract time to permit changes equal in value only to 3% of the total contract.

Substantial completion of the contract was accomplished about March 15, 1935, but corrections noted in the final inspection were not completed until the last of July 1935 (Fdg. 1; R. 18).

The completion date as extended 362 days by the petitioner was June 9, 1935. This was 55 days beyond the time when the contract was substantially completed on March 15, 1935 (Fdg. 1; R. 18), but fell short by 52 days of the time when corrections incident to final inspection were completed the last of July, 1935 (Fdg. 1; R. 18).

From the foregoing, it will be observed that change orders, strikes, bad weather and default of subcontractors actually caused not 362 days delay, but 145 days delay. The contract completion date, June 12, 1934, was, therefore, actually delayed by the causes stated to November 4, 1934, which was 131 days before substantial completion on March 15, 1935. The lower court found that the completion of the work was delayed 60 days by errors of petitioner and its long delays in correcting them and in deciding questions and acting on change proposals (Fdg. 17; R. 30). The remaining 71 days of the 131 days presumably were "The greater part of the delay in completing the contract, with resulting additional cost and expense to the plaintiff", which, the lower court found, "resulted from the inability of the defendant to surrender spaces in the old building [to permit work to proceed, Fdg. R. 20-21] at the times plaintiff desired such spaces * * *" (Fdg. 4, last paragraph; R. 21; 43). The refusal to surrender spaces was excused by the lower court on the ground that the surrender would have interrupted the business of the Post Office (R. 43).

The causes of the delay which is the basis for the principal issue in the case at bar are found by the lower court as follows: "The errors of the defendant and its long delays in correcting them and in deciding questions and acting on change proposals (outlined in Findings 5

to 13, inclusive [R. 21-29]) together delayed the final completion of the contract for a period of 60 days, and caused the plaintiff to incur losses or expenses * * * (Fdg. 17; R. 30).

The court below assessed damages caused by the delays for which respondent was responsible in the amount of \$19,596.30 and entered judgment therefor. Included in this amount were two items to which petitioner raises objection. One of these items was \$5,875.00, a portion of the respondent's main office overhead "allocable to the Post Office job on the basis of the ratio of the monthly gross of the Post Office job to the gross of all jobs being performed by the plaintiff * * *" during the period of delay, and which the lower court found respondent incurred as a loss (Fdg. 17; R. 30). The other item to which petitioner objects is \$548 representing the rental value of certain equipment held on the job during the periods of delay and which the lower court found the plaintiff incurred as a loss (Fdg. 17; R. 30).

THE WRIT OF CERTIORARI SHOULD BE DENIED.

SUMMARY OF ARGUMENT.

The errors of the Government and its long delays in correcting them and in deciding questions and acting on change proposals delayed the final completion of the work under respondent's contract with the Government sixty days (Fdg. 17; R. 30). Unless delay caused by the Government to a contractor is the result of the exercise by the Government of rights and privileges created by the contract, the Government is liable to the contractor for the damages resulting from such errors and delays. *United States v. Smith*, 94 U. S. 214; *United States v. Mueller*, 113 U. S. 153. The Government is not excused from responding in damages caused by its delays, not resulting from the exercise by the Government of its legal

rights under the contract, because the work, although delayed, was completed within the time provided by the contract. The cases of *Crook Company, Inc. v. United States*, 270 U. S. 4; *United States v. Rice*, 317 U. S. 61; and *United States v. Blair*, 321 U. S. 730, do not hold contrary to respondent's contention because in those cases the delays were caused either by the acts of third persons, or were the result of the exercise by the Government of its legal rights under its contracts.

The respondent is entitled to recover as part of the damages caused by the delays a proportionate amount of its main office overhead and the rental value of equipment held on the job during the period of delay. See rule for estimation of damages by Court of Claims in *United States v. Smith*, *supra*.

ARGUMENT.

1. It is a well recognized general principle that the Government must respond in damages when one with whom it contracts is damaged by delays caused by the Government during the performance of the contract, and not incidental to the exercise of a legal right of the Government. In *United States v. Smith*, 94 U. S. 214, work under a Government contract was suspended for two months by order of a Government officer. There was no provision in the contract permitting suspension of the work by the Government. This Court affirmed a judgment of the Court of Claims awarding damages caused by the delay. The Court said (p. 217) :

"Under such circumstances, the law implies that the work should be done within a reasonable time, and that the United States would not unnecessarily interfere to prevent this."

The Court held that the suspension of work for a period of sixty days "would be considered an improper interference" (p. 218).

In *United States v. Mueller*, 113 U. S. 153, the Government suspended delivery of certain stone under a contract therefor relying upon the provision in the contract that stone would be delivered "at such time and, in such quantities as may be required" by the supervising architect. The order of suspension recited that the Government "does not require that any more stock should be delivered at the present time". The contractor sued for damages caused by the delays due to suspension of delivery of the stone. The Court of Claims awarded damages because the deliveries were suspended, not because of Government "requirements", but to enable the Government to consider a change of purpose in regard to the stone and the site of the building. This Court affirmed the judgment for damages.

In *Chouteau v. United States*, 95 U. S. 61, in which this Court refused to disturb the judgment of the lower court denying damages for delays caused by the Government in the performance of a construction contract, it appeared that the contract contemplated that it would not be completed for an indefinite period of time.

Likewise in the case of *Wells Brothers Company of New York v. United States*, 254 U. S. 83, recovery of damages caused by delays of the Government was denied because the contract contained a specific provision "that no claim shall be made or allowed to the contractor for any damages which may arise out of any delays by the United States".

Petitioner relies principally upon the cases of *United States v. Blair*, 321 U. S. 730; *United States v. Rice*, 317 U. S. 61; and *Crook Company, Inc. v. United States*, 270 U. S. 4, as authority for the proposition that the respondent is not entitled to damages suffered by it, because of delays caused by the Government, if the work under the contract was completed within the contract time as extended by time granted by the Government for the completion of change orders. None of the cases cited is on its facts

authority for this contention. These cases did not disturb the general principle laid down by *United States v. Smith, supra*, and *United States v. Mueller, supra*.

In *Crook Company, Inc. v. United States*, the delay was caused not by acts of the United States, but by the failure of another contractor to have the building ready in time to permit the complaining contractor to install the heating system within the time planned.

In *United States v. Rice*, the delay was caused by the necessity of making changes in a contract other than plaintiff's contract. There was no delay caused by errors of the Government and unreasonable time taken in correcting them.

In *United States v. Blair*, the plaintiff was delayed because another contractor with the Government failed to proceed expeditiously. Here again there was no fault on the part of the Government. This Court specifically pointed out in this case that "nowhere is there spelled out any duty on the Government to take *affirmative steps* to prevent a contractor from unreasonably delaying or interfering with the attempt of another contractor to finish ahead of his schedule". (Italics supplied.)

The situation in the case at bar is quite different from that disclosed by the facts in the last three cases cited. Whereas in the cited cases there was no fault by the Government which brought about the delays which caused the damage, in the case at bar the lower court has found that respondent's errors and its long delays in correcting them and in deciding questions and acting on change proposals delayed the final completion of the contract sixty days. These errors and long delays by the Government are amply demonstrated by the detailed findings of fact of the lower court (Fdgs. 5 to 13, inclusive; R. 21-29).

Petitioner's errors which caused delays consisted of errors in the specifications and in drawings intended to correct such errors (Fdg. 5; R. 21-22); errors in failing

to include in the drawings alterations which would be necessary to permit installation of new equipment provided for by the contract (Fdg. 6; R. 22); the letting of another contract relating to the same job with provisions which made it necessary for respondent to devise methods other than those provided by its contract to enable it to perform part of its work (Fdg. 7; R. 23); error in the drawings relating to the subsoil drainage system (Fdg. 9; R. 25); refusal of the petitioner to follow the provisions of the plans and specifications when it became inconvenient to do so thus compelling the respondent to delay its work and devise methods, not provided or contemplated by the contract, to perform the work (Fdg. 13; R. 27-29).

While under the decision in the *Blair* case there is no duty upon the Government to take affirmative action to assist a contractor in completing his work in a shorter time than that contemplated and provided for in the contract, there is clearly upon the Government an obligation not by its errors to cast obstacles in the way of the contractor and thus retard the progress of his work so that it will not be completed within the time it otherwise would be had there been no obstacles.

When respondent entered into the contract with the Government, it was justified in assuming that, while the Government might avail itself of its right to make changes in the terms of the contract for any of the reasons contemplated by Articles 3 and 4 (R. 10-11) of the contract, the Government would not delay it by its errors and mistakes and its dilatoriness in correcting the errors and in acting upon change order proposals.

The petitioner in the case at bar concedes that "the Government was more directly at fault than in the *Blair* case, since its liability is rested on its own tardiness rather than, as in the *Blair* case, that of another contractor". (Ericsson Brief, p. 7.)¹

¹ In the case at bar, petitioner does not state in detail its reasons for

2. The lower court in arriving at respondent's damages due to petitioner's delays included in the damages \$5,875 which was a portion of the overhead of respondent's main office in Chicago, Illinois, which the lower court held was "allocable to the Post Office job on the basis of the ratio of the monthly gross of the Post Office job to the gross of all jobs being performed by the plaintiff" during the period of delays (Fdg. 17; R. 30). The Court also included in the damages \$548, the rental value of certain equipment on the job during the period of delay (Fdg. 17; R. 30).

The lower court held that these as well as other items included in the damages were "losses or expenses" incurred by the respondent (Fdg. 17; R. 30). To the inclusion of these two items in the damages, petitioner objects. With respect to the proportionate amount of the main office overhead, petitioner's objection to its inclusion is apparently based upon the contention that there was no showing that any of the main office overhead was increased by the delays. (Ericsson Brief, page 9.)²

It is established as a fact before this Court that the respondent incurred these amounts as losses.

In *United States v. Smith*, 94 U. S. 214, this Court laid down the rule covering the estimation of damages by the Court of Claims in the following language (p. 219) :

"In the estimation of damages the Court of Claims occupies the position of a jury under like circumstances. Damages must be proved. The Court is not permitted to guess any more than a jury, but, like a jury, it must make its estimates from the proofs"

² The findings of the lower court on this point were somewhat different in the Ericsson case than in the case at bar. However, since petitioner incorporates by reference its argument in the Ericsson case, petitioner's reasons must be inferred from its reasons in the Ericsson case.

asking that the writ be granted, but incorporates by reference the reasons for the granting of the writ in the case of *United States, Petitioner, v. Henry Ericsson Company*, No. 701, October term, 1945. There are factual differences in the two cases which make it important that the facts in each case be scrutinized without any assumption that the facts are so similar that only general principles of law need be considered.

submitted. The result of the best judgment of the triers is all that the parties have any right to expect." (Italics supplied.)

In the *Smith* case, the Government objected to a judgment in round figures and insisted that specific items of damage should be shown. This Court, however, sustained the award of the Court of Claims.

It cannot be presumed on the record before this Court that the lower court did not have ample evidence before it to justify the finding that this portion of the main office overhead was a loss to respondent because of the delays and that the portion that was a loss should properly be measured by the method adopted by the lower court. These were the lower court's conclusions acting as a jury. There was no duty upon the lower court to delineate in its verdict the evidence which moved it to arrive at its conclusions.

The same reasoning applies to the objection of petitioner to the inclusion in the damages of the rental value of equipment during the delay period. As with the previous item, the lower court found as a fact that the "plaintiff incurred losses or expenses" in these amounts, because of the delays.

The reasons for petitioner's objection to this item must be gleaned from the Ericsson case brief (page 10) where it appears that the findings of the lower court were different than those in the case at bar. However, it seems that petitioner's objection is that there should have been a finding that the respondent would have rented the equipment except for its use on the job during the delay period. This objection, however, is foreclosed by the specific finding of the lower court that the respondent incurred losses and expenses which included the rental value. It must be presumed that the lower court acting as a jury had before it evidence to justify this finding.

CONCLUSION.

It is respectfully submitted that the record in this case does not disclose any errors by the lower court nor any failure to follow the decisions of this Court. The petition for writ of certiorari should, therefore, be denied.

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